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13 Attorneys for Plaintiff
14 NORTHERN CALIFORNIA RIVER WATCH

15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION
19

20 NORTHERN CALIFORNIA RIVER
21 WATCH , a non-profit Corporation,

22 Plaintiff,

23 v.

24 CITY OF SAN JOSE, et al.

25 Defendant.
26

Case Number: 3:12-cv-01624 HRL

[PROPOSED] CONSENT DECREE

27 WHEREAS, Northern California River Watch ("River Watch") is a 501(c)(3) non-
28 profit, public benefit corporation organized under the laws of the State of California with a

1 specific purpose to protect, enhance, and help restore the surface waters and
2 groundwaters of California including all rivers, creeks, streams, wetlands, vernal pools and
3 tributaries;

4 WHEREAS, the City of San Jose, ("City") a city organized under the laws of the
5 State of California, owns the San Jose/Santa Clara Water Pollution Control Plant ("Plant")
6 through a Joint Powers Agreement with the City of Santa Clara, operates the Plant as the
7 administering agency of the Joint Powers Agreement, and individually owns and operates
8 the City's sewage collection system and storm water collection system. River Watch and
9 the City are collectively referred to herein as the "Parties";

10 WHEREAS, discharges of treated wastewater from the Plant are regulated under
11 Order No. R2-2009-0038, National Pollutant Discharge Elimination System ("NPDES")
12 Permit No. CA0037842;

13 WHEREAS, on or about November 30, 2011 River Watch served the City, the
14 Administrator of the EPA Region IX, the Executive Director of the State Water Resources
15 Control Board, the U.S. Attorney General and the Administrator of the EPA, with a Notice
16 of Violations and Intent to File Suit under Section 505(a) of the Clean Water Act ("CWA"),
17 33 U.S.C. §1365(a) ("Notice Letter") alleging violations of the Act and the Permit at the
18 Plant and the City's sewage collection system;

19 WHEREAS, on or about May 30, 2012 River Watch filed its First Amended
20 Complaint against the City, which First Amended Complaint includes the Notice Letter;

21 WHEREAS, the City denies any and all allegations and claims set forth in the
22 Notice Letter and First Amended Complaint; and

23 WHEREAS, the Parties believe it is in their mutual interest, and have chosen,
24 without either adjudication of River Watch's claims or admission by the City of any alleged
25 violation or other wrongdoing, to resolve in full the allegations and claims as set forth in
26 the Notice Letter and First Amended Complaint through settlement, to avoid the cost and
27 uncertainties of litigation;

28 ///

1 **NOW THEREFORE IT IS HEREBY STIPULATED BY THE PARTIES, AND**
2 **ORDERED AND DECREED BY THE COURT AS FOLLOWS:**

3 **I. COMMITMENTS OF THE CITY**

4 **A. Sewer System Inspection and Repair**

5 1. Televising and Grading Sewer Main Lines within 200 feet of Water Bodies

6 Within two (2) years of the Effective Date of this Consent Decree the City shall
7 complete a condition assessment ("Condition Assessment"), consisting of CCTV
8 inspection and the rating of all structural defects according to the Pipeline Assessment
9 and Certification Program ("PACP") rating system, of all City-owned gravity sewer mains
10 ("City Mains") located within 200 feet of a surface water, as that term is defined in the
11 City's Sewer System Management Plan ("SSMP"), except for:

- 12 a. City Mains with a diameter of eighteen (18) inches or greater;
13 b. City Mains for which a video or CCTV inspection has occurred within ten (10)
14 years prior to the Effective Date of this Consent Decree; and,
15 c. City Mains installed, repaired or replaced within fifteen (15) years prior to the
16 Effective Date of this Consent Decree.

17 2. Prioritizing Repairs and Replacement

18 For all City Mains assessed pursuant to Paragraph 1 that receive a rating of 5
19 under the PACP rating system, the City shall make its best effort to repair or replace the
20 defective segment of the line within one (1) year of the rating determination. If repair or
21 replacement within one (1) year is not feasible, the City shall repair or replace all such
22 lines as soon thereafter as possible, but no later than two (2) years from the rating
23 determination. For all City Mains assessed pursuant to Paragraph 1 that receive a rating
24 of 4 under the PACP rating system, the City shall repair or replace the defective segment
25 of the line within five (5) years of the rating determination.

26 3. Condition Assessment of 70% of City Collection System

27 Within ten (10) years of the Effective Date of this Consent Decree, the City shall
28 complete a Condition Assessment of seventy percent (70%) of all City Mains, excluding:

- a. City Mains with a diameter of eighteen (18) inches or greater;
- b. City Mains for which a video or CCTV inspection has occurred within ten years prior to the Effective Date of this Consent Decree; and,
- c. City Mains installed, repaired or replaced within fifteen (15) years prior to the Effective Date of this Consent Decree.

B. Reporting, Prevention and Mitigation of SSOs.

1. Detailing SSO Reporting

a. Within one (1) year of the Effective Date of this Consent Decree, the City shall modify its Overflow Emergency Response Plan to state that field crews responding to a Category I sanitary sewer overflow ("SSO") should contact nearby residents or business operators whenever feasible, to assist in estimating the SSO start time and include the names of such persons in the SSO Report Form.

b. The City shall also modify its Overflow Emergency Response Plan to include a list of questions which the dispatcher receiving the initial notification of the SSO will ask the notifying party to help estimate the SSO start time.

2. SSOs of 5,000 Gallons or Mores

Whenever an SSO of 5,000 gallons or more reaches surface waters, the City will determine and address the cause of the SSO that enters surface waters, and employ the following measures to prevent future overflows: (i) if the SSO is caused by a structural defect, then City will immediately schedule the defective line for repair or replacement. For defective segments that are less than or equal to 50 feet, the City shall repair or replace the defective segment within six (6) months. For defective segments that are greater than 50 feet, the City shall repair or replace the defective segment within five (5) years; provided however, the City shall take interim measures to prevent repeat SSOs from the defective segment, such as more frequent cleaning, inspections, or root control; (ii) if the defect is non-structural, such as a grease blockage or vandalism to a manhole cover, then City will perform additional maintenance or cleaning, and any other appropriate measures to address the non-structural defect.

1 3. Flow Level Devices

2 For the term of this Consent Decree, the City shall deploy at least twenty (20) Smart
3 Cover or similar manhole cover devices at appropriate locations that will provide the City
4 with information of the flows at those locations and with the intention of reducing SSOs.

5 4. Web Site SSO Hot Link

6 Within one (1) year of the Effective Date of this Consent Decree, the City shall
7 create a hot link on its website to the State Water Resources Control Board's California
8 Integrated Water Quality System SSO public reports. The City shall provide notification to
9 all customers and other members of the public of the existence of the web-based
10 program.

11 5. SSO Discharge to Critical Habitat Identification

12 Starting thirty (30) days from the Effective Date of this Consent Decree, if an SSO
13 is discharged to a critical habitat, as that term is defined in the Endangered Species Act
14 and designated by National Marine Fisheries Service or the U.S. Fish and Wildlife Service,
15 for listed or threatened salmonids, the Red-legged Frog, Pickleweed, the Salt Marsh
16 Harvest Mouse or Tiger Salamander, the City shall note in its CIWQS Report the fact that
17 the SSO occurred in the designated critical habitat and identify the species for which the
18 habitat was designated.

19 **C. Supplemental Environmental Project ("SEP")**

20 The City shall fund a Sewer Lateral Replacement Grant Program ("Program") in the
21 amount of \$300,000. The Program will provide grants to eligible homeowners to replace
22 defective sewer laterals in the amount of fifty percent (50%) of the cost of replacement up
23 to a maximum of \$3,500 per sewer lateral. Funds will be available on a first-come/first-
24 served basis. The City shall advertise the Program to the public. Interested homeowners
25 must hire an independent contractor to conduct a closed-circuit television ("CCTV")
26 inspection of their sewer lateral and provide a CD/DVD of the inspection to the City. If City
27 personnel determines that the sewer lateral is defective based on the CCTV inspection
28 results, the homeowner may submit a grant application to the City. The grant application

1 must be accompanied by three (3) bids from licensed contractors. If the application is
2 approved, the homeowner must complete the work within ninety (90) days. Upon
3 completion of the work, the contractor must perform a post-CCTV inspection of the new
4 sewer lateral. The homeowner must then submit to the City a copy of the post-CCTV
5 inspection in CD/DVD format and the paid-in-full invoice for the work performed by the
6 contractor for reimbursement.

7 **II. ATTORNEYS' FEES AND COSTS**

8 Within fifteen (15) days after the Effective Date of this Agreement, the City shall pay
9 River Watch the sum of One Hundred Fifty Thousand Dollars (\$150,000) as
10 reimbursement for River Watch's investigative, expert and attorneys' fees and costs and
11 any other costs that have or could have been claimed in connection with River Watch's
12 allegations set forth in its Notice Letter and First Amended Complaint. Payment shall be
13 made by the City to River Watch in the form of a single check payable to "California River
14 Watch," mailed to Law Office of Jack Silver, P.O. Box 5469, Santa Rosa, CA 95402, and
15 shall constitute full and complete satisfaction of any and all claims by River Watch for
16 attorneys' fees and costs in connection with this matter up to and including the
17 Termination Date of this Consent Decree.

18 **III. RELEASE OF CLAIMS**

19 A. Upon the Effective Date of this Consent Decree, River Watch, on behalf of itself, its
20 officers, members, agents, successors and assigns, and any other person acting under its
21 direction and control with respect to this matter, agrees that it releases, acquits and
22 forever discharges the City, its elected and appointed officials, officers, employees,
23 agents, attorneys, legal successors and assigns, and any other person acting on the City's
24 behalf, from any and all environmental claims and demands of any kind, nature, or
25 description whatsoever, and from any and all liabilities, damages, injuries, actions or
26 causes of action, either at law or in equity, whether known or unknown (collectively,
27 "Claims") arising from or related to the violations alleged, or which could have been
28 alleged, in the Notice Letter and the First Amended Complaint, including but not limited to,

1 any and all Claims for violations of the Clean Water Act, which occurred at any time up to
2 the Effective Date of this Consent Decree.

3 B. The foregoing release is intended to extend up to the Effective Date of this Consent
4 Decree. The Parties to this Consent Decree acknowledge they are familiar with Section
5 1542 of the California Civil Code, which provides:

6 *A general release does not extend to claims which the creditor does not*
7 *know or suspect to exist in his or her favor at the time of executing the*
8 *release which if known by him or her must have materially affected his*
9 *or her settlement with the debtor.*

10
11 The Parties hereby waive and relinquish any rights or benefits they may have under
12 California Civil Code Section 1542 with respect to any other Claims under the Clean Water
13 Act against each other, known or unknown, suspected or unsuspected.

14 **IV. COVENANT NOT TO SUE**

15 A. For a period of five (5) years following the Effective Date of this Consent Decree,
16 River Watch agrees that neither River Watch, nor any of its officers, executive staff,
17 members of its governing board, nor any organization under the control of River Watch, its
18 officers, executive staff, and members of its governing board, will serve any 60-day Notice
19 of Violations upon, or file any lawsuit against the City seeking relief for alleged SSOs,
20 alleged violations of the Clean Water Act or alleged violations of the California Porter-
21 Cologne Water Quality Control Act.

22 B. For a period of five (5) years following the Effective Date of this Consent Decree,
23 River Watch agrees that it will neither initiate nor support such lawsuits against the City
24 brought by other groups or individuals by providing financial assistance, personnel time, or
25 any other affirmative actions.

26 C. For the period beyond five (5) years from the Effective Date of this Consent Decree
27 and through the Termination Date of this Consent Decree, River Watch agrees that
28 neither River Watch, its officers, executive staff, members of its governing board, nor any

1 organization under the control of River Watch, will file a complaint or serve any new 60-
2 day Notice of Violations pertaining to the types of violations alleged, or which could have
3 been alleged, in the Notice Letter and the First Amended Complaint that are the subject of
4 any pending relief agreed to by the City as a provision of this Consent Decree that has not
5 been completed.

6 **V. MISCELLANEOUS PROVISIONS**

7 **A. Effective Date.** The Effective Date of this Consent Decree shall be the date that
8 the Court enters the final Consent Decree.

9 **B. Termination Date.** This Consent Decree shall terminate on the earlier of: (a) the
10 date the City completes the activities set forth in paragraphs I. A - C above, and payment
11 pursuant to paragraph II has been made, or (b) ten (10) years from the Effective Date of
12 this Consent Decree ("Termination Date").

13 **C. Dispute Resolution Procedures.** Any disputes with respect to any of the
14 provisions of this Consent Decree shall be resolved through the following procedure:

15 1. The Parties covenant and agree that, if either party believes the other is in
16 violation of one or more terms of the Consent Decree, the party shall provide notice to the
17 other in writing of what actions or inactions they deem to be in violation of this Consent
18 Decree.

19 2. Within thirty (30) days of receipt of such notice, the party receiving the notice
20 shall respond to the notice in writing.

21 3. If the Parties still dispute compliance with this Consent Decree, within an
22 additional thirty (30) days, the Parties will meet and confer in a good faith attempt to
23 resolve their dispute.

24 4. If the Parties cannot informally resolve the dispute, either party can invoke
25 formal dispute resolution by filing a motion with the court.

26 **D. Force Majeure**

27 Separate from, and in addition to any other limitations on the City's obligations
28 under this Consent Decree, the City's obligations to comply with any provision of this

1 Consent Decree shall be excused or deferred if compliance, or a delay in compliance, is
2 caused by an event or circumstance beyond the reasonable control of the City or any
3 entity controlled by the City, including its contractors, and which event or circumstance
4 could not have been reasonably foreseen and prevented by the exercise of due diligence
5 by the City. Where implementation of the actions set forth in this Consent Decree, within
6 the deadlines prescribed, becomes unachievable despite the timely good faith efforts of
7 the City, the City shall notify River Watch in writing within thirty (30) days of the date that
8 the City knew of the event or circumstance precluding compliance, and shall describe the
9 reason for the non-performance. The Parties agree to meet and confer in good faith
10 concerning the non-performance and, where the Parties concur that the non-performance
11 was or is impossible, despite the timely good faith efforts of one of the Parties, compliance
12 shall be excused or new performance deadlines shall be established by agreement of the
13 parties. In the event that the Parties cannot timely agree, either party shall have the right
14 to invoke the dispute resolution procedure described herein.

15 **E. Construction.** The language in all parts of this Consent Decree shall be construed
16 according to its plain and ordinary meaning, except as to those terms defined by law, in
17 the Clean Water Act, or specifically herein. The captions and paragraph headings used in
18 this Consent Decree are for reference only and shall not affect the construction of this
19 Consent Decree.

20 **F. Choice of Law.** This Consent Decree shall be governed by the laws of the United
21 States.

22 **G. Severability.** In the event that any provision, section, or sentence of this Consent
23 Decree is held by a court to be unenforceable, the validity of the enforceable provisions
24 shall not be adversely affected.

25 **H. Notices/Correspondence.** Any and all notices or documents required or provided
26 for by this Consent Decree, or any correspondence pertaining to this Consent Decree,
27 shall be sent via U.S. Mail, certified mail, overnight delivery, or electronic mail
28 transmission to the addresses listed below:

1 **For River Watch:**

2 California River Watch

3 290 S. Main St. #817

4 Sebastopol, CA 95472

5 AND:

6 Jerry Bernhaut, Esq.

7 Law Office of Jack Silver

8 P.O. Box 5469

9 Santa Rosa, CA 95402-5469

10 Email: j2bernhaut@yahoo.com

11
12 **For the City:**

13 Kevin O'Connor

14 City of San Jose Department of Transportation

15 1404 Mabury Road

16 San Jose, CA 95133

17 Telephone: (408) 794-1900

18 Email: Kevin.O'Connor@sanjoseca.gov

19 AND

20 Office of the City Attorney

21 200 East Santa Clara Street

22 San Jose, CA 95113

23 Telephone: 408-535-1900

24 Email: cao.main@sanjoseca.gov

25 Notifications of communications shall be deemed submitted on the date that they are sent
26 by electronic mail, postmarked and sent by first-class mail, or deposited with an overnight
27 mail/delivery service. Any change of address or addresses shall be communicated in the
28 manner described above for giving notices.

1 **I. Execution in Counterparts.** This Consent Decree may be executed in any number
2 of counterparts, all of which together shall constitute one original document. Facsimile
3 copies of original signatures shall be deemed to be originally executed counterparts of this
4 Consent Decree.

5 **J. Modification.** This Consent Decree, and any provisions herein, may not be
6 changed, waived, discharged or terminated unless by a written instrument signed by the
7 Parties.

8 **K. Full Settlement.** This Consent Decree constitutes a full and final settlement of the
9 claims and allegations contained in the Notice Letter and the First Amended Complaint. It
10 is expressly understood and agreed that the Consent Decree has been freely and
11 voluntarily entered into by the Parties with and upon advice of the Parties' respective
12 counsel.

13 **L. Integration.** This is an integrated Consent Decree. This Consent Decree is
14 intended to be a full and complete statement of the terms of the agreement between the
15 Parties and expressly supersedes any and all prior oral or written agreements covenants,
16 representations, and warranties (express or implied) concerning the subject matter of this
17 Consent Decree.

18 **M. Negotiated Agreement.** The Parties have negotiated this Consent Decree and
19 agree that it shall not be construed against the party preparing it, but shall be construed as
20 if the Parties jointly prepared this Consent Decree and any uncertainty and ambiguity shall
21 not be interpreted against any one party.

22 **N. Continuing Jurisdiction.** The Parties stipulate that the U.S. District Court,
23 Northern District of California, shall retain jurisdiction to enforce the terms and conditions
24 of this Consent Decree and to resolve disputes arising hereunder as may be necessary or
25 appropriate for the construction or execution of this Consent Decree up to and including
26 the Termination Date.

27 **O. Impossibility of Performance.** If for any reason the U.S. Department of Justice,
28 the U.S. Environmental Protection Agency or the District Court objects to entry of this

1 Consent Decree in the form presented, the Parties shall use their best efforts to work
2 together to modify the Consent Decree within thirty (30) days so that it is acceptable to the
3 U.S. Department of Justice, the U.S. Environmental Protection Agency and the District
4 Court.

5 **P. Department of Justice Review.** Within three (3) days of the Parties' execution of
6 this Consent Decree, River Watch shall (a) submit this Consent Decree to the U.S.
7 Department of Justice and U.S. Environmental Protection Agency by certified mail, return
8 receipt requested, for the 45-day agency review period consistent with 33 U.S.C.
9 § 1365(c) and 40 C.F.R. §135.5; and (b) lodge this [proposed] Consent Decree with the
10 District Court. After the United States has either completed its review of this Consent
11 Decree without objection, or the 45-day agency review period has expired, whichever is
12 earlier, River Watch shall promptly request the District Court to enter this Consent Decree.

13 **Q. No Third Party Beneficiaries.** This Consent Decree is not intended to confer any
14 rights or obligations on any third party and no third party shall have any right of action
15 under this Consent Decree for any cause whatsoever.

16 **R. No Admission of Liability.** Neither this Consent Decree nor any payment
17 pursuant to this Consent Decree shall constitute or be construed as a finding, adjudication
18 or acknowledgment of any fact, law, or liability, nor shall it be construed as an admission
19 of violation of any law, rule, regulation or permit. The City maintains and reserves all
20 defenses it may have to any alleged violations that may be raised in the future.

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1 The Parties hereto enter into this Consent Decree and submit it to the Court for its
2 approval and entry as a final judgment.

3
4 Dated: 4-8, 2013

NORTHERN CALIFORNIA RIVER WATCH

5 By: Margaret Bacigalupi
6 Margaret Bacigalupi
7 Board President

8
9
10 CITY OF SAN JOSE

11
12 Dated: _____, 2013

13 By: _____
14 Richard Doyle,
15 City Attorney

16 IT IS SO ORDERED.

17
18 Dated: _____

19 By: _____
20 HOWARD R. LLOYD
21 UNITED STATES MAGISTRATE JUDGE